

No. 89-211

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

SOUTHERN ELECTRICAL RETIREMENT FUND, -

Petitioner,

v.

SYLVIA ANGELA CUSTER,

Respondent.

**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION**

PATRICK, BEARD & RICHARDSON, P.C.

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FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

7 pp

QUESTION PRESENTED

The case at bar involves the interpretation of a property settlement agreement entered into between Kenneth Wayne Custer and his ex-wife and the Respondent in this case, Sylvia Angela Custer. The legal issue presented by the Petitioner, Southern Electrical Retirement Fund (hereinafter sometimes referred to as "S.E.R.F."), is whether or not S.E.R.F. has to comply with an order of the trial court and the provisions of ERISA set forth in 29 U.S.C. §1056(D)(ii).

The Circuit Court for Chattanooga, Hamilton County, Tennessee and the Court of Appeals for the Eastern Section of Tennessee have applied the statutory requirements as set forth in 29 U.S.C. §1056(D)(ii) and ordered pursuant to the Qualified Domestic Relations Order (hereinafter referred to as "QDRO").

PARTIES

The Petitioner, Southern Electrical Retirement Fund, is a large pension fund which covers electricians and is represented in the Petition for Writ of Certiorari by counsel, S. Del Fuston.

The Respondent, Sylvia Angela Custer, is the ex-wife of Kenneth Wayne Custer and is represented in this case by attorney, Michael E. Richardson.

ARGUMENT

As stated by the Petitioner, the Circuit Court for Hamilton County, Chattanooga, Tennessee, and the Court of Appeals for the Eastern District of Tennessee have unanimously held that contrary to S.E.R.F.'s argument, disbursement of Retirement Plan Funds to the Respondent, a non-participant spouse, in compliance with a QDRO is not contingent upon the age of the participant spouse at the time the funds are to be distributed. These Courts have unanimously held that since the Respondent's divorce decree was a "Qualified Domestic Relations Order" as defined by ERISA in 29 U.S.C. §1056(D)(3), the Respondent should be entitled to receive the fund awarded to her by the Court's decree and voluntarily entered into between the Respondent and the Respondent's ex-husband, "as if the participant (the Respondent's ex-husband) had retired on the date on which such payment is to begin. ..." 29 U.S.C. §1056(D)(3)(E)(I)(ii) (1985).

By adding Paragraph (3) to 29 U.S.C. §1056(d), Congress specifically provided that if an order requires payment of benefits to an alternative payee "as if the participant had retired on the date on which such payment is to begin under the order," it would meet the requirements of that clause.

As correctly pointed out by the Petitioner, the general rule relative to pension plans is that the participant's retirement benefits should not be subject to garnishment, levy or execution by some third party. However, the United States Congress set forth a specific exception to this general rule in passing into law the Retirement Equity Act of 1984, which is set forth in 29 U.S.C. §1056(D). This enactment specifically amended ERISA and pro-

vided for a QDRO.

Although S.E.R.F.'s Summary Plan description is subject to such a QDRO, the Respondent now seeks to limit the applicability of the Retirement Equity Act of 1984. On page 21 of S.E.R.F.'s Retirement Fund Summary Plan Description the following paragraph is found:

Benefits payable under the plan are not subject in any manner to sale, transfer, alienation, pledge or any other type of assignment of benefits, voluntary or involuntary, except by a Qualified Domestic Relations Order. A Qualified Domestic Relations Order is a judgement made under a state domestic relations law relating to the provision of child support, alimony payment, or marital property rights. In order to qualify as a Domestic Relations Order, a judgement is subject to other requirements regarding appropriate notification to the fund by the Court and the manner in which your benefits are assigned by the Court.

A review of 29 U.S.C. §1056(D)(ii) shows the following:

29 U.S.C. §1056(D)(ii). The earliest retirement age means the earlier of:

(i) the date on which the participant is entitled to a distribution under the plan or

(ii) the later of

a) the date the participant obtains age 50, or

b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

As previously recited by the Petitioner, the Circuit Court for Hamilton County, Chattanooga, Tennessee pursuant to the Property Settlement Agreement entered into between the Respondent and her ex-husband has adjudicated the Respondent to be an alternate payee or participant under the pension plan of her ex-husband. In fact, the Petitioner apparently concedes that the Respondent is in fact a participant under the Plan at issue, but merely argues what distribution date should be applied to this QDRO.

The Respondent avers that since the Respondent is a participant under the Plan, the provisions of 29 U.S.C. §1056 (D)(3)(E)(I)(ii) control, and the Respondent is entitled to immediate distribution under the QDRO previously approved by the Circuit Court.

A review of the applicable sections of ERISA show the clear language of such amendment to allow the Respondent to be entitled to distribution pursuant to the Circuit Court's judgment of such property settlement agreement to be a QDRO. A review of other state courts which have made a determination as to the proper distribution date under a QDRO are in complete agreement with the interpretation applied by the Court of Appeals for the Eastern District of Tennessee. In fact, the Petitioner has failed to set forth any case law in his Application for Writ of Certiorari which is in dispute with the interpretation applied by the Court of Appeals for the Eastern District of Tennessee.

A review of the legislative history of the Retirement Equity Act of 1984 'notes' that ERISA was amended by the Defendant to:

Provide for greater equity under private pension plans for workers and their spouses...by taking into account the changes in work patterns, the status of marriage and economic partnership, and a substantial contribution to the partnership of spouses who work both in and outside the home.

S. Rep. No. 575, 98 Cong. 2nd Sess. (1984), reprinted in 1984 U.S. Cong. N. Admin. News 2547. Such report stated specifically in direct conflict with the Petitioner's assertion that "the assignment of an alternate payee's rights to the (pension benefits) is not considered an assignment or alienation of benefits under a plan if and only if the order is a QDRO," and that state law providing these rights under a QDRO would be exempt from Federal preemption. Id. at 2565.

As previously determined by the Court of Appeals for the Eastern District of Tennessee and conceded by the Petitioner in its Application for Writ of Certiorari, the divorce judgment of the Respondent as entered into in July 1987, contained a QDRO that in every aspect fully complies with the requirements set forth in ERISA.

One of the uses of a QDRO is to enable a divorce court to equalize the equitable division of marital assets between spouses. The interpretation advanced by the petitioner would totally frustrate this use of a QDRO since it would put the non-participating spouse into a position where he or she would not be able to receive their share of this marital asset until possibly many years in the future.

Contrary to the petitioner's argument, disbursement


of retirement plan funds to a nonparticipant spouse in compliance with a QDRO is not contingent upon the age of the participant spouse at the time the funds are to be distributed. Since the Custers' divorce decree is a "Qualified Domestic Relations Order" as defined by ERISA in 29 U.S.C. §1056(d)(3), the wife may receive the fund awarded to her by the court's decree "as if the participant [Mr. Custer] had retired on the date on which such payment is to begin." 29 U.S.C. §1056(d)(3)(E)(i)(II) (1985).

CONCLUSION

For the foregoing reasons, the Respondent respectfully asserts that the Petitioner's Writ of Certiorari is without merit and should be dismissed with costs being assessed against the Petitioner.

Respectfully submitted,

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